IN THE COURT OF APPEALS OF IOWA

No. 9-025 / 08-0705
Filed April 22, 2009

CEDAR CITY ENTERPRISES, INC.,
Plaintiff/Counterclaim Defendant-Appellee,

vs.

GRAF PROPERTIES, L.L.C.,
Defendant/Counterclaimant-Appellant.

Appeal from the Iowa District Court for Linn County, James H. Carter, Senior Judge.

Defendant appeals from a district court judgment awarding plaintiff damages in a breach of contract action. **AFFIRMED.**

Gregory J. Epping of Terpstra & Epping, Cedar Rapids, for appellant.

William Croghan and Larry J. Thorson of Ackley, Kopecky & Kingery, L.L.P., Cedar Rapids, for appellee.

Considered by Miller, P.J., and Vaitheswaran and Doyle, JJ.

MILLER, J.

Graf Properties, L.L.C. appeals from a district court judgment awarding Cedar City Enterprises, Inc. damages in a breach of contract action. It claims the district court erred in denying its equitable defenses of estoppel by acquiescence and rescission. We affirm the judgment of the district court.

On July 1, 2003, Cedar City and Michael Graf on behalf of Graf Properties entered into three separate agreements for Graf Properties to purchase three rental properties owned by Cedar City. The contracts provided that Graf Properties would make monthly payments to Cedar City with the contracts to "be paid in full on or before July 1, 2007."

Soon after entering into the agreements, Michael Graf began experiencing financial problems. He made a partial payment on December 2, 2003, and on December 23, he informed William Dale, the president of Cedar City, that he was "going to have to let the property go back to Cedar City." Graf met with Dale and the vice president of Cedar City, David Karr, on January 28, 2004. At that time, Graf Properties was approximately $5800 behind in payments. Dale and Karr told Graf that if he paid $5000 towards the delinquent payments, they would consider taking the properties back after inspecting them. Graf gave Dale and Karr the keys to the properties, and they inspected them that day only to discover that the properties were not in good repair.

Dale and Karr attempted to contact Graf several times after their meeting on January 28, 2004, but he did not respond. They received notification in February 2004 that Graf had cancelled his insurance policies on the properties.

Cedar City was subsequently unable to insure one of the properties because it was not occupied. That property was heavily damaged by a fire in March 2004. Cedar City took over the management of the two remaining properties and found a buyer for them. Graf signed quit claim deeds transferring those properties back to Cedar City on January 16, 2006.

On February 1, 2006, Cedar City filed a petition at law against Graf Properties, seeking damages for its breach of contract as to the property that was heavily damaged by a fire. Graf Properties answered, generally denying the allegations contained in the petition and asserting rescission and estoppel as affirmative defenses. The matter was tried to the district court without a jury. After hearing the parties' evidence, the court rejected the affirmative defenses raised by Graf Properties and entered a judgment in favor of Cedar City on its breach of contract claim. Graf Properties appeals.

The parties disagree as to the applicable scope of review. Cedar City asserts that because this case was filed and tried as a law action, our review is for the correction of errors at law. Graf Properties, on the other hand, asserts that because it raised equitable defenses in response to Cedar City's breach of contract claim, our review is de novo.

We review a case on appeal in the same manner it was tried in district court. *Stanley v. Fitzgerald*, 580 N.W.2d 742, 744 (Iowa 1998). This breach of contract case was instituted as a law action and tried as such. "It is a general rule that if the action is instituted in law it continues to be such even though the defendant interposes equitable defenses by way of answer, counterclaim, or

cross-petition." *People's Trust & Sav. Bank v. Engle*, 194 Iowa 518, 521, 188 N.W. 707, 708 (1922); *see also Weltzin v. Nail*, 618 N.W.2d 293, 298 (Iowa 2000) ("[I]f an action was brought at law, and an equitable defense raised, that would not invoke equity jurisdiction automatically.").

We therefore review this matter for the correction of errors at law. Iowa R. App. P. 6.4. The district court's findings of fact are accordingly binding on us if supported by substantial evidence. Iowa R. App. 6.14(6)(*a*). Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion. *Arnevik v. Univ. of Minn. Bd. of Regents*, 642 N.W.2d 315, 318 (Iowa 2002). Based on our review of the record, we conclude the court's denial of the equitable defenses raised by Graf Properties is supported by substantial evidence and its application of law is correct.

In order to establish estoppel by acquiescence, Graf Properties was required to show Cedar City knew or ought to have known that it was entitled to enforce a right and neglected to do so for such a length of time as would imply that it intended to waive or abandon the right. *Humboldt Livestock Auction v. B&H Cattle Co.*, 261 Iowa 419, 432, 155 N.W.2d 478, 487 (1967). The doctrine is based on an examination of the individual's actions who holds the right in order to determine whether that right has been waived. *Davidson v. Van Lengen*, 266 N.W.2d 436, 439 (Iowa 1978). "Where acts and conduct are relied upon as proof of waiver, the intention of the party charged to waive his rights must clearly appear." *Continental Cas. Co. v. G.R. Kinney Co.*, 258 Iowa 658, 661, 140

N.W.2d 129, 130 (1966). Acquiescence is ordinarily a question of fact. *Humboldt Livestock Auction*, 261 Iowa at 433, 155 N.W.2d at 487.

We find ample evidence in the record to support the district court's determination that the circumstances present in this case "do not imply an intent on [Cedar City's] part to abandon its rights." The court found, and the parties do not disagree, that Graf Properties was $5800 behind in its payments on the contract involved in this case. Karr testified that he and Dale informed Graf that if he paid $5000 "as far as the back payments were concerned . . . we would consider taking the property back. [Graf] stated that he would have to take that under advisement and would get back to us, which he never did." The court "credit[ed] Karr's testimony in this regard" in finding that "any consideration of [Cedar City] taking the property back was conditioned upon [Graf] paying Cedar City $5,000." *See Paglia v. Elliott*, 373 N.W.2d 121, 126 (Iowa 1985) (finding trial court is in best position to judge credibility of witnesses). There is no dispute that Graf did not pay Cedar City $5000. Karr and Dale both testified that they attempted to contact Graf regarding the property, but they received no response.

Graf Properties nevertheless argues that Cedar City's actions in accepting the keys to the property, its payment of taxes and utilities, and its attempt to insure the property indicate Cedar City intended to abandon its rights and rescind the contract. The district court rejected this argument, finding that Cedar City accepted the keys to the property from Graf to "assure itself that the rental property that it was being asked to take back would produce an economic result that would justify that action." It then concluded the fire that occurred after Cedar

City inspected the property "left no reasonable expectation of Cedar City taking the property back." The court further found "Cedar City's attempt to insure the property and its payment of taxes and utilities can be explained as efforts to protect its security interest." Substantial evidence supports those findings.

Karr testified that he and Dale wanted to inspect the property "to see if it was something we wanted to take back." He further testified that after they received the keys to the rental property from Graf, he and Dale inspected the property and discovered it was vacant and "not in very good shape." The property was then seriously damaged by a fire. Cedar City's attempt to insure the property before the fire and its payment of the taxes on it were consistent with the parties' contract, which provided that in the event Graf Properties defaulted on such obligations, "Seller may elect to pay such taxes and assessments, effect insurance and make necessary repairs, and all sums so expended shall be due and payable on demand." Karr additionally testified that Cedar City paid the utilities on the property after Graf Properties ceased to do so because "anytime anybody takes properties out of their name, they automatically go back into our name so that they would not be shut off and cause reconnection fees."

We do not agree with Graf Properties that Cedar City's delay in suing on the contract clearly indicates the parties' "mutual understanding that the contract is terminated," *Fulton v. Chase*, 240 Iowa 771, 775, 37 N.W.2d 920, 922 (1949), as is required to establish the defense of rescission. *Cf. Henderson v. Beatty*, 124 Iowa 163, 169, 99 N.W. 716, 718-19 (1904) (finding rescission where parties

orally agreed to terminate the contract and plaintiffs then waited two years to sue for specific performance). As the district court found, "Graf did not assert in his testimony that either Karr or Dale ever told him that Cedar City was acquiescing in his tendered rescission of the installment sale." Although "mutual rescission of a contract does not require a formal agreement," *Fulton*, 240 Iowa at 774, 37 N.W.2d at 922, "[c]onduct establishing rescission by mutual consent must be clear and unequivocal and must be inconsistent with the existence of the contract." *Novak Equip., Inc. v. Hartl*, 168 N.W.2d 924, 927 (Iowa 1969). The evidence detailed above provides substantial support for the district court's finding that the conduct relied on by Graf Properties falls short of these requirements. We thus find no error of law in the court's conclusion that Graf Properties did not establish its defense of rescission.[1]

The judgment of the district court denying the equitable defenses raised by Graf Properties and awarding Cedar City damages is affirmed.

AFFIRMED.

[1] We therefore need not and do not address Cedar City's argument that the statute of frauds "should apply in this instance to render testimony of modification of the written agreement between the parties incompetent."